

1 Maria R. Metcalf  
2 954 Surrey Drive  
3 Chula Vista, CA 91902

FILED

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CLERK'S OFFICE - SOUTHERN DISTRICT OF CALIFORNIA

BY L/MX DEPUTY

4 Maria R. Metcalf, plaintiff  
5 Dennis R. Gray, intervenor

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8 IN THE UNITED STATES DISTRICT COURT

9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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11 MARIA R. METCALF, ) CASE NO. 3-08-CV-00731-W-POR  
12 Plaintiff, )  
13 v. ) PLAINTIFF MARIA R. METCALF'S AND  
14 DREXEL LENDING GROUP, a ) INTERVENOR DENNIS R. GRAY'S  
15 California corporation, OLD ) EX PARTE APPLICATION  
16 REPUBLIC TITLE COMPANY, a )  
17 California corporation, AURORA )  
18 LOAN SERVICES LLC, a )  
19 California limited liability company; )  
20 MORTGAGE ELECTRONIC )  
21 REGISTRATION SYSTEMS, INC., ) Date June 23, 2008  
22 a Delaware corporation, and ) Time: 10:30 a.m.  
23 ROBERT E. WEISS ) Courtroom: 7  
24 INCORPORATED, a California )  
25 Corporation, )  
26

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27 **MEMORANDUM OF POINTS AND AUTHORITIES**

28 1. INTRODUCTION.

Plaintiff makes this ex parte motion to move this court for a temporary restraining order to enjoin and restrain the defendants from evicting her family from their home at 954 Surrey Drive, Bonita, California; to request that pending motions to dismiss and motions to remove this action be denied; and to grant her leave to amend the complaint to cure the alleged deficiencies and

1 protect the interests of the intervenor Dennis Gray. Dennis Gray is currently in possession of  
 2 the home property. Gray seeks to intervene in this case in order to protect his property interest  
 3 previously noticed to defendants by his commercial lien, UCC registered # DG03171943. It is  
 4 within the discretion of the Court to determine the fact, extent, and manner of participation of  
 5 Dennis Gray.

6 ARGUMENT

7       1. Dennis Gray's Commercial Lien and his Desire to Participate in These Proceedings  
 8 Provides Grounds for Necessary Intervention

9       The Federal Rules of Civil Procedure provide that a court may, at its discretion, permit  
 10 intervention in a district court action "(1) when a statute of the United States confers a  
 11 conditional right to intervene; or (2) when an applicant's claim or defense and the main action  
 12 have a question of law or fact in common." Fed. R. Civ. P. 24(b).<sup>(2)</sup> In exercising its discretion,  
 13 "the court shall consider whether the intervention will unduly delay or prejudice the adjudication  
 14 of the rights of the original parties" Id.

15       Dennis Gray is the homebuilder of the subject dwelling and partner with Plaintiff for over 17  
 16 years. His commercial lien evidences his claim and as has questions of law and fact in common  
 17 with the plaintiff's complaint. The intervention will not unduly delay or prejudice the rights of  
 18 the original parties. Since plaintiff is in pro per and her current location has circumvented her  
 19 ability to respond to currently pending motion matters, Gray joins her requests herein to stay the  
 20 pending sheriff's eviction, for the court to deny all pending defendants' motions; and to allow  
 21 plaintiff leave to amend her complaint. Plaintiff respectfully requests an extension of time to  
 22 address the matters of the complaint and intervenor joins this request to maintain the status quo  
 23 to allow the parties to participate in these proceedings and to preserve the issues presented in  
 24 Metcalf's complaint and the in light of the violations of federal laws and regulations regarding

1 mortgages, fair debt collection practices, including the wrongful foreclosure and tender by  
 2 plaintiff. Because the motions herein will deny plaintiff and intervenor a hearing on their rights  
 3 to possession to their primary residence and home for their family, the Court must issue this  
 4 order *ex parte* for it to have any effect whatsoever.

5

6       2. Dennis Gray Has a Claim That Shares a Question of Law or Fact with the Main Action

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8 The second branch of Rule 24(b) provides for intervention, at the Court's discretion, "when an  
 9 applicant's claim or defense and the main action have a question of law or fact in common." Fed.  
 10 R. Civ. P. 24(b)(2). The commercial lien of Dennis Gray asserts such claim or defense and  
 11 supports plaintiff's request to amend the complaint and deny the pending defendants' motions.

12

13 As used in Rule 24(b)(2), [t]he words 'claim or defense' manifestly refer to the kinds of  
 14 claims or defenses that can be raised in courts of law as part of an actual or impending law suit,  
 15 as is confirmed by Rule 24(c)'s requirement that the person desiring to intervene serve a motion  
 16 stating 'the ground therefor' and "accompanied by a pleading setting forth the claim or defense  
 17 for which intervention is sought." Dennis Gray intends to join plaintiff as a co-plaintiff in an  
 18 amended complaint.

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20 Diamond v. Charles, 476 U.S. 54, 76-77 (1986) (O'Connor, J., concurring). That is, a would-  
 21 be intervenor by permission must "assert[ an] actual, present interest that would permit him to  
 22 sue or be sued by [someone] in an action sharing common questions of law or fact with those at  
 23 issue in this litigation." Id. at 77; see also SEC v. United States Realty & Improvement Co., 310  
 24 U.S. 434, 459-60 (1940) (SEC properly permitted to intervene where its claim or defense was  
 25 founded on an interest that could properly have been asserted by any participant in the main  
 26 bankruptcy proceeding and had a question of law in common with the main proceeding); IBM,  
 27 1995-2 Trade Cas. (CCH) at 75,458 (permissive intervention improper because "none of the  
 28 claims asserted by the Proposed Intervenors is legally cognizable in an independent lawsuit");  
 Donson Stores, Inc. v. Am. Bakeries Co., 58 F.R.D. 481, 483 (S.D.N.Y. 1973) ("[t]he rule

1 permitting intervention presupposes that the applicant has a right to maintain a claim for the  
 2 relief he seeks."). Here Gray has attached a copy of his UCC Registered #DG03171943  
 3 commercial lien

4  
 5 The requirement that the would-be intervenor assert a claim that would allow him to bring an  
 6 action that shares a question of law or fact with the main action reflects the "public interest in the  
 7 efficient resolution of controversies." 7C Charles Alan Wright et al., Federal Practice and  
 8 Procedure § 1901, at 230 (2nd ed. 1986). Without that commonality of claims, there is no saving  
 9 from adding parties. See Mass. Sch. of Law, 118 F.3d at 782 ("litigative economy, reduced risks  
 10 of inconsistency, and increased information" are the "hoped-for advantages" of intervention).  
 11 Here the would-be intervenor has legitimate claims (and a basis for intervention as of right or  
 12 alternatively joining the plaintiff as a co-plaintiff), thus the Court must permit intervention as it  
 13 serves a legitimate interest.

14  
 15 3. The Court Should Grant The Requested Injunctive Relief and Requested Other Relief to  
 16 Protect the Property Rights of Plaintiff and Intervening Party Seeking to Protect His  
 17 Interests.

18 Pursuant to Rule 65 of the Federal Rules of Civil Procedure, the Court may grant  
 19 preliminary injunctive relief or temporary restraining orders in order to prevent "immediate  
 20 and irreparable injury." Fed. R. Civ. P. 65(b). This equitable relief is within the discretion  
 21 of the Court after balancing various factors. *Benda v. Grand Lodge of the Int'l Assoc. of*  
 22 *Machinists & Aerospace Workers*, 584 F.2d 308, 314 (9th Cir. 1978). Traditionally, the  
 23 "criteria for granting preliminary injunctive relief are (1) a strong likelihood of success on  
 24 the merits, (2) the possibility of irreparable injury to plaintiff if the preliminary relief is not  
 25 granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public  
 26 interest (in certain cases)." *Dollar Rent A Car v. Travelers Indem. Co.*, 774 F.2d 1371, 1374  
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 28

<sup>1</sup> (9th Cir. 1985); *see, e.g.*, *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005); *Johnson v. Cal. State Bd. of 14 Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995).

<sup>4</sup> Alternatively, the Court may grant temporary relief on a lesser showing of probable  
<sup>5</sup> success. "If the harm that may occur to the plaintiff is sufficiently serious, it is only necessary  
<sup>6</sup> that there be a fair chance of success on the merits." *William Inglis & Sons Baking Co. v. ITT*  
<sup>7</sup> *Continental Baking Co.*, 526 F.2d 86,88 (9th Cir. 1975) (quoting *C. Tenant & Sons, Inc. v. NY*  
<sup>8</sup> *Terminal Conference*, 299 F. Supp. 796, 799 (S.D.N.Y. 1969)); *see Johnson*, 72 F.3d at 1430;  
<sup>9</sup> *Benda*, 584 F.2d at 314. The burden may be met by demonstrating either "a combination of  
<sup>10</sup> probable success on the merits and the possibility of irreparable injury or that serious questions  
<sup>11</sup> are raised and the balance of hardships tips sharply in its favor." *Wright v. Rushen*, 642 F.2d  
<sup>12</sup> 1129, 1132 (9th Cir. 1981); *see Sonoran* 408 F.3d at 1120 (explaining that "[t]hese two  
<sup>13</sup> formulations represent two points on a sliding scale in which the required degree of irreparable  
<sup>14</sup> harm increases as the probability of success decreases. They are... outer reaches of a single  
<sup>15</sup> continuum." (Citations omitted)); *Johnson*, 72 F.3d at 1430; *Sports Form, Inc. v. United Press*  
<sup>16</sup> *Int'l, Inc.*, 686 F.2d 751, 752 (9th Cir. 1982); *Benda* 584 F.2d at 314.

<sup>20</sup>  
<sup>21</sup> Moreover, preliminary relief in the form of a temporary restraining order can be granted  
<sup>22</sup> without notice when immediate and irreparable injury would result. Fed. R. Civ. P. 65(b). "Ex  
<sup>23</sup> parte temporary restraining orders are no doubt necessary in certain circumstances but under  
<sup>24</sup> federal law they should be restricted to serving their underlying purpose of preserving the status  
<sup>25</sup> quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no  
<sup>26</sup> longer." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local*  
<sup>27</sup> *No. 70 of Alameda County*, 415 U.S. 423, 439, 94 S. Ct. 1113 (1974). When the requirements of

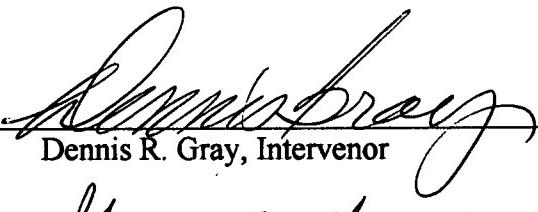
1 Rule 65 are met and the applicant "sufficiently demonstrates the reason that notice should not be  
 2 required," an ex parte temporary restraining order may be issued. In re Vuitton et Fils SA., 606  
 3 F.2d 1,4 (2d Cir. 1979) (internal quotation marks omitted) (noting this relief is particularly  
 4 appropriate "when it is the sole method of preserving a state of affairs in which the court can  
 5 provide effective final relief"). Moreover, if notice would "render fruitless further prosecution of  
 6 the action," which is contrary to the intent of the Rule, notice is not necessary for the issuance of  
 7 a temporary restraining order. Id. at 5; Am. Can Co. v. Mansukhani, 742 F.2d 314,322 (7th Cir.  
 8 1984); see also Adobe Sys., Inc. v. S Sun Prods., Inc., 167 F.R.D. 636, 639 (S.D. Cal. 1999).

11 The Court should grant plaintiff and Dennis Gray's ex parte motion in its entirety to  
 12 preserve the status quo since Dennis Gray is a necessary party and plaintiff is unable to  
 13 adequately protect her interest until her release on July 3, 2008.

15 **CONCLUSION**

17 The Court should grant plaintiff and Dennis Gray's ex parte motion in its entirety to  
 18 preserve the status quo and to preserve the issues presented in the complaint since Dennis Gray is  
 19 a necessary party and plaintiff has been impeded by intervening circumstances that have  
 20 hampered her ability to respond. All pending motions to dismiss and motions to remand must be  
 21 denied. A stay of the pending immediate eviction from the subject premises must issue to  
 22 prevent irreparable injury to plaintiff and Dennis Gray.

24  
 25 Dated: June 23, 2008

26 By:   
 Dennis R. Gray, Intervenor

27  
 28 By:   
 Maria Metcalf, Plaintiff

**SUPPORTING DECLARATION OF DENNIS R. GRAY**

I, Dennis R. Gray, declare:

1. I am a partner of plaintiff in the within matter and intervenor party. The facts set forth herein are within my personal knowledge and, if called upon to do so, I could and would competently testify thereto under oath. This declaration is made in support of ex parte application for injunctive stay of pending sheriff's eviction of my home located at 954 Surrey Drive, Bonita California set for immediate execution; request to court to deny all pending motions to dismiss and motions to remand the within action; and request to allow plaintiff to amend the complaint and properly serve all parties.

2. I am the builder and investor of monies, time, and labor into the single family home that is wrongfully threatened by the actions and fraudulent activities of the defendants in this action. Contrary to defendants' representations, they have no standing to carry out a nonjudicial foreclosure sale and further wrongful claims in a state unlawful detainer action. I gave them notice of my commercial lien and affidavit attached hereto and UCC registered #DG03171943 and plaintiff letters requesting validation and verification of the alleged debt. Defendants dishonored all communications. See a true copy of my commercial lien attached hereto as Exhibit "A".

3. Plaintiff provided a tender of payment by bond to the designated pay off department. Full tender was not accredited to plaintiff's account.

4. Plaintiff and I are left without a remedy and our home is set for pending eviction by sheriff immediately.

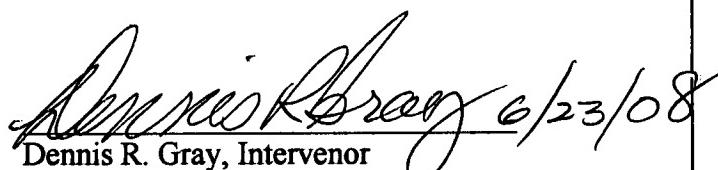
5. Plaintiff is incarcerated and will be released on July 3, 2008 from the Las Colinas Women's Detention Facility in Santee, California. Our ability to respond was stopped by the circumstances of her location which kept our communications to a minimal level. Her ability to respond to the pending motions to dismiss and motions to remand this matter has been unduly restricted as a result of her present location. Due to these circumstances she was not free to seek

1 legal counsel and was not allowed to respond effectively to the matters herein. On July 4, 2008  
2 or as soon as possible, Plaintiff's intent is to amend the within complaint to protect her interests  
3 and join my interests as intervenor.  
4

5 Since our visits and communications are restricted, I was unable to effectively respond to the  
6 defendants' multiple motions and wrongful allegations. I agreed to wait until Plaintiff could  
7 amend her complaint to protect my interests. However, since the plaintiff is not being released in  
8 time to make an adequate response and pending defendants motions could make her complaint  
9 moot, I requests the court grant plaintiff leave to amend the complaint to protect our family's  
10 home and my commercial lien interests.

11 7. This ex parte application is being faxed to defendants who appeared in this action  
12 to advise that any opposition to this ex parte request must be immediately filed with the Court.

13 I declare under penalty of perjury under the laws of the United States that the foregoing is  
14 true and correct. Executed on 23th day of June, 2008 at Bonita, California.

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17 Dennis R. Gray 6/23/08  
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